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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-944

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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The petitioner Time, Inc., respectfully prays that a writ of certiorari issue to review the opinions and orders of the Supreme Court of Florida, quashing orders directing entry of judgment for petitioner, and remanding the cause with directions to reinstate the jury verdict and final judgment thereon in favor of respondent.

OPINIONS AND ORDERS BELOW

The opinion and order of the Florida Supreme Court, initially rejecting petitioner's Federal constitutional claims, and remanding the cause to the District Court of Appeal for consideration of state law issues is reported at 271 So. 2d 745 and attached as Appendix A.

The subsequent opinion and order of the District Court of Appeal on remand, holding for petitioner on the state law issues and directing entry of judgment in favor of petitioner, is reported at 279 So. 2d 389 and attached as Appendix B.

The final opinion and order of the Florida Supreme Court, quashing the decision of the District Court of Appeal in favor of petitioner, and remanding the cause with directions to reinstate the jury verdict and final judgment thereon in favor of respondent, is not yet officially reported and is attached as Appendix C.*

JURISDICTION

The order of the Supreme Court of Florida directing final judgment in favor of respondent was entered December 11, 1974, and became final January 11, 1975 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).**

*Opinions and orders of the lower courts, prior to the first opinion of the Florida Supreme Court, are also attached in chronological order as follows: The original opinion of the trial court, granting summary judgment for petitioner, rendered November 15, 1968, and not officially reported, is Appendix D. The opinion of the District Court of Appeal, reversing that grant of summary judgment, 231 So. 2d 862, is Appendix E. The judgment in favor of respondent following trial and jury verdict entered on September 9, 1970, is Appendix F. The opinion and order of the District Court of Appeal, reversing the trial court's judgment in favor of respondent and directing entry of judgment in favor of petitioner, 254 So. 2d 386, is Appendix G. That opinion was followed by the two opinions of the Florida Supreme Court and the intervening opinion of the District Court of Appeal described above in the text.

**This petition also brings before this Court the prior opinion and order of the Florida Supreme Court entered December 20, 1972 (Appendix A), which initially rejected petitioner's Federal constitutional claims. Review of that decision was not previously sought because it was not final for the purpose of this Court's jurisdiction, in that it remanded the cause to the District Court of Appeal for consideration of state law issues. Now that the Supreme Court of Florida has rendered its final judgment—reversing the decision of the District Court of Appeal in favor of petitioner on remand, and directing the entry of final judgment for respondent—this Court has jurisdiction to review the cause, including the prior opinion and judgment of the Florida Supreme Court, under 28 U. S. C. § 1257(3). *Reece* v. *Georgia*, 350 U. S. 85, 87.

Upon application by petitioner the Supreme Court of Florida has suspended remand of the action to the District Court of Appeal until February 10, 1975. The Supreme Court of Florida has refused further to suspend remand pending decision by this Court on petitioner's petition for certiorari. For that reason, petitioner will separately apply to this Court for an order directing the Supreme Court of Florida to suspend remand and entry of a mandate to the District Court of Appeal pending decision of this Court on this petition for certiorari.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault with respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner is the publisher of the weekly newsmagazine, *TIME*. Respondent brought this action for libel based on an item which appeared in the Milestones section of *TIME*

dated December 22, 1967, but which closed on Saturday, December 16, 1967, concerning a decision of the Circuit Court, Palm Beach County, Florida, rendered December 15, 1967. The item stated as follows: (Pl. Ex. 1)

> "Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

The decision thus reported was rendered on Friday, December 15, 1967, at 4:39 p.m. At 6:52 p.m. that evening petitioner received an AP dispatch which, in pertinent part, read as follows: (Def. Ex. 1)

> "WEST PALM BEACH, Fla. AP—Millionaire industrial heir Russell A. Firestone Jr. was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultery and extreme cruelty."

Later that evening petitioner received the New York Daily News for December 16, 1967, which, in pertinent part, read as follows: (Def. Ex. 3)

> "West Palm Beach, Fla., Dec. 15 (Special)—The stormy, scandal-ridden divorce trial of millionaire Russell A. Firestone Jr. ended today when the rubber and oil heir was granted a divorce from his third wife, a statuesque onetime West Palm Beach schoolteacher, who had been accused of adultery."

On December 16, 1967, in response to a query sent to petitioner's Miami bureau, petitioner received a dispatch at 11:52 a.m. from Richard Duncan, head of that bureau, which in pertinent part, read as follows: (Def. Ex. 2)

> "... Judge James Knott commented: 'According to certain testimony in behalf of the defendant (Russell), extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'"

Finally, at 1:25 p.m. on December 16, 1967, petitioner received a dispatch from Robert Delaney, Palm Beach "stringer" working on a special assignment basis, which, in pertinent part, read as follows: (Pl. Ex. 4)

> "... The technical grounds for divorce according to Joseph Farrish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. . . ."

Based on those two items and two dispatches, the *TIME* editorial team, consisting of Ursula Nadasdy, researcher, William Doerner, writer, and George Daniels, Sr. Editor in charge of the Milestones section of *TIME* magazine, wrote, edited and checked for accuracy the item on which suit was brought. All testified at the trial as to their complete belief in the truth of the news item both at the time of the publication and at the time of the trial (Tr. pp. 191, 230, 232, 235, 237, 269, 272, 274, 298, 328, 329, 376-79).

The actual opinion in *Firestone* v. *Firestone,* on which report was made in *TIME's* Milestones item but which the editorial personnel had not seen prior to publication, is

essentially the same as the two news items and two dispatches on which the *TIME* item was based. If one excludes those portions of the opinion which merely give the fact of marriage and residence, deal with financial disputes between the parties or cite authority, the opinion reads as follows: (Pl. Ex. 2)

> "This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), *the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery,* and the wife's answer thereto setting up certain affirmative defenses. . . ." (Italics added)
>
> ". . . .
>
> "According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testin ony, in plaintiff's behalf, would indicate that defen lant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount most of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . ."
>
> ". . . .
>
> "In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.
>
> ". . . .

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; *that defendant's counterclaim for divorce be and the same is hereby granted,* and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." (Italics added)

". . . .

"4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff."

This action was commenced March 12, 1968, based on respondent's contention—squarely belied by the express statements in the divorce court's opinion that the husband's "counterclaim for divorce on grounds of extreme cruelty and adultery" was "hereby granted"—that she had not lost the divorce case on the ground of adultery and, for that reason, her reputation had been damaged.* Based on the facts above stated, petitioner moved for summary judgment on First Amendment grounds (as made applicable to the States by the due process clause of the Fourteenth Amendment**). That motion was granted by the trial court on

*Long after the publication in 1967 and the commencement of this action in 1968, the divorce decree was upheld on appeal. The District Court of Appeal affirmed without opinion in 1971, 249 So. 2d 719. The Supreme Court of Florida also affirmed in 1972, but with modifications, stating in its opinion that "lack of domestication" was not a ground for divorce, but that the decree could be sustained on the ground of "extreme cruelty", and gratuitously adding that the trial court had not found the wife guilty of adultery. 263 So. 2d 223.

**In its answer to the complaint petitioner asserted that the publication in suit was protected by the constitutional guarantees of freedom of the press embodied in the First and Fourteenth Amendments; these Federal constitutional claims were properly preserved and passed upon as noted in the text which follows above.

November 15, 1968, on the ground that "defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness" (Appendix D). The District Court of Appeal reversed on January 26, 1970 (231 So. 2d 862, Appendix E), on the ground that summary judgment was not available as a procedural device in Florida where state of mind was an issue.

Final preparation for trial was then begun with two significant occurrences. First, the trial court, despite proof of the prominent press coverage which respondent and her marital litigation had received, ruled that no constitutional issue was presented. Second, after it became apparent that petitioner was going to vigorously meet the issue of damage to respondent's reputation, respondent was allowed to withdraw her claim for damage to reputation and to proceed "simply on the mental pain and anguish of Mrs. Firestone". The trial then proceeded, with all First Amendment objections renewed and reserved throughout, and resulted in a verdict of $100,000 for respondent with a significant finding that no punitive damages would be allowed.

On a second appeal to the District Court of Appeal that Court reversed on four common law grounds and, also, on the basis of the First Amendment, stating with respect to the latter (254 So. 2d at 389-90, Appendix G):

> "Time testified as to the elaborate procedures undertaken to ensure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth. . . . It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circum-

> stances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

The Court's holding was grounded on its conclusion "that the divorce of Mary Alice Firestone was an event of great public interest"; it noted that she was possibly "a public figure" but said "we need not go that far to substantiate our result." (*Ibid.*)

The Supreme Court of Florida granted certiorari and reversed (271 So. 2d 745, Appendix A) solely on the constitutional ground. Despite noting that respondent and her husband were "well known" and "prominent", that their divorce action was "a veritable *cause celebre*" which received national news coverage and "was unquestionably news worthy", the Court inexplicably held that reports of the Firestone divorce "were not constitutionally protected as being matters of real public or general concern." The Court did not consider other reasons warranting constitutional protection, such as whether respondent was a public figure, the fact that petitioner's news item was a report of judicial proceedings, and that it was in any event a reasonable interpretation of an ambiguous document. Instead, the Florida Supreme Court remanded the case to the District Court of Appeal for further consideration of the four common law issues. On remand, the District Court of Appeal adhered to its prior decision in favor of petitioner on those issues (Appendix B). The Florida Supreme Court thereupon again granted certiorari and rendered its final decision, reversing and directing the entry of final judgment for respondent (Appendix C). Petitioner accordingly now seeks review of the holdings of the Florida Supreme Court denying its claims to constitutional protection.

REASONS FOR GRANTING THE WRIT

In rejecting petitioner's First Amendment claims the Supreme Court of Florida has decided important questions of press freedom contrary to applicable decisions of this Court. Review is further called for because of the attitude toward the commands of the First Amendment displayed by the Florida Supreme Court in its opinions in this case, and in others. It apparently neither likes nor trusts the press which made necessary the recent decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241. The same result must follow here. If the $100,000 verdict is permitted to stand in the circumstances of this case, the ability of the press to report the news generally, and judicial proceedings in particular, will be gravely impaired.

1. This Court's constitutional decisions in the libel field—beginning with *New York Times* and extending through *Gertz**—make clear that the First Amendment precludes imposing liability without fault. The news item in this case is clearly entitled to First Amendment protection, whether that protection be the more limited shield provided by *Gertz* or the more stringent "actual malice" test of *New York Times* and *Butts.* But whatever the applicable test, the Supreme Court of Florida has exceeded constitutional bounds in imposing liability without fault.

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*For brevity and ease of reading, we shall in this petition refer to past First Amendment decisions of this Court by their shorthand names, *i.e., New York Times, Butts, Gertz,* etc. Decisions so referred to include *New York Times* v. *Sullivan,* 376 U. S. 254; *Garrison* v. *Louisiana,* 379 U. S. 64; *Rosenblatt* v. *Baer,* 383 U. S. 75; *Time, Inc.* v. *Hill,* 385 U. S. 374; *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130; *Greenbelt Cooperative Pub. Ass'n* v. *Bresler,* 398 U. S. 6; *Time, Inc.* v. *Pape,* 401 U. S. 279; *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265; *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29; *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241; *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323.

Moreover, it has done so solely on the basis of its claim that petitioner erred in reporting that respondent was divorced on the ground of adultery—a claim which lacks substance because the news item, despite the garbled rationale of the Florida Supreme Court, stated precisely what the decision it reported had held.

The jury at the trial never passed on the question of petitioner's fault, other than to refuse to award punitive damages and thus endorse petitioner's good faith, for the only issue given to the jury was that of truth. Even the issue of qualified privilege to report judicial proceedings was given to the jury on the basis that the report must be accurate.

The editorial process presented to the trial court and to the Supreme Court of Florida, was clearly proper editorial procedure with respect to a newsworthy item reporting on a judicial decision of considerable public interest. Testimony by Researcher Nadasdy, Writer Doerner and Editor Daniels made that quite clear. The item was written, edited and checked, based upon an AP dispatch and a New York Daily News clipping plus two specific written dispatches from Florida. Those four documents gave precisely the same picture as does the opinion of the trial court in the Firestone divorce case itself, namely, that the divorce was founded both on extreme cruelty and adultery. There is thus no possible negligence, whether with "convincing clarity" or not and, again, no error. The lack of error is also significant in the fact that no retraction was given, a fact repeatedly stressed in argument in the trial court and stressed by the Florida Supreme Court in both of its opinions in this action. How can one retract that which is true? And how does that lack of retraction possibly make any difference whatsoever with respect to a constitutional defense either of lack of negligence or of lack of "actual malice", each of which must be judged by facts prior to

publication and not that which took place after publication. The Florida Supreme Court seemed to be oblivious of this obvious fact.

There is simply no basis, on the facts of this case, for finding that petitioner was negligent or otherwise at fault. As the District Court of Appeal said in its second opinion (254 So. 2d 389-90, Appendix G):

> "Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth."
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> "It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

Yet the Florida Supreme Court now disposes of those findings in a single paragraph of its opinion, as follows: (Appendix C, p. C10).

> "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.*, supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found

> guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.' "

The Supreme Court of Florida thus found negligence based *solely* on its view that the *TIME* Milestones item was in error. In so doing, it clearly departed from the rule running through all constitutional First Amendment cases commencing with *New York Times* that liability cannot be predicated solely on error. *New York Times,* p. 273, *Garrison,* pp. 73, 75, 78, *Hill,* pp. 387-88, *Greenbelt,* p. 10, *Gertz,* pp. 340-41. And even that claim of error is erroneous, since there was no error. The Supreme Court of Florida seemed unable to grasp the elementary principle that the trial court in the Firestone divorce action did what it was not supposed to do, *i.e.,* it found adultery and also awarded alimony. But the fact that it was not supposed to do that cannot possibly prove that it did not do that, because that was precisely what it did. The fact that the Florida Supreme Court, some five years later, in its final decision with respect to the Firestone divorce case (263 So. 2d 223) upheld the "extreme cruelty" ground of the divorce award (p. 225), which made unnecessary investigation of the "adultery" trial court ground of the divorce award, and gratuitously added that the trial court "did not find the wife guilty of adultery" (p. 225), cannot

change what the divorce court did. That court, faced with a counterclaim for divorce by the husband founded both on "extreme cruelty and adultery", simply stated that "defendant's counterclaim for divorce be and the same is hereby granted"—which can only mean, in plain English, that it found for the husband on both adultery and extreme cruelty. Unless the plain meaning of the English language is to be completely disregarded in the Florida courts, the Florida trial court plainly did what the *TIME* item said it did, and the gratuitous remark in the Supreme Court opinion regarding the basis of the decision can no more change that than it can change black to white, nor can it afford any basis for denying First Amendment protection to petitioner.

2. The holdings below are incompatible with this Court's opinion in *Time, Inc.* v. *Pape,* for a "rational interpretation of an ambiguous document" can no more be the basis for a finding of fault than it can be for a finding of "actual malice". The District Court of Appeal dealt with this matter in its second opinion as follows (254 So. 2d 390, Appendix G):

> "The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.
>
> "The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, '[a]ccording to certain testimony in behalf of the defendant,

extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.' Part of this language was reproduced exactly in Time's article.

"In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification."

In writing the report in this case, the *TIME* personnel had before them an AP dispatch which directly quoted from the language of the final decree describing the plaintiff's "extramarital escapades" (Def. Ex. 1). The same language was quoted in a second dispatch (Def. Ex. 2) and in a newspaper report (Def. Ex. 3) which they had. Adultery is specifically mentioned no less than three times in the dispatches and newspaper stories they had before them (Pl. Ex. 4, Def. Exs. 1, 3). And one dispatch asserted "as fact" that adultery was a ground for the divorce (Pl. Ex. 4).

3. Unless reversed, the holdings of the Florida Supreme Court will make it impossible for the press to report judicial decisions, particularly in any current and meaningful way. This Court has emphasized that "maximum freedom must be allowed the press" in "informing the citizenry of . . . court proceedings . . . " *Estes* v. *Texas,* 381 U. S. 532, at

539, and see also 541-42.* That freedom is nullified by the holdings below.

The Supreme Court of Florida has apparently decreed that a publisher cannot safely report a court decision unless he satisfies all of the following requirements—

—A copy of the decision must be obtained before publication. It is not enough to publish on the basis of descriptions of the decision.

—The decision must be carefully analyzed for inconsistent statements and legal rationale. It is not enough to report what a court said it did. A publisher must report what a court *should* have said it did.

—A publisher must anticipate what a reviewing court, long after the event (five years here), will say a lower court held or should have held.

These requirements are not only absurd—if petitioner had had a copy of the Firestone divorce decision when its Milestones item was written, the item would have been exactly the same, for that opinion expressly granted the husband's counterclaim and stated that the counterclaim was for "extreme cruelty and adultery", and those facts cannot be changed. More importantly those requirements frustrate the public's right to have current and meaningful reporting of judicial decisions. A publisher would be at risk even if he simply printed the full text of the decision. And there would be inordinate delay.**

**See also* the following cases which likewise stress the public's right to be informed about judicial proceedings and the freedom of the press to report those proceedings: *Craig* v. *Harney,* 331 U. S. 367, 374; *In re Oliver,* 333 U. S. 257, 268.

**If petitioner had printed the full text of the divorce court's opinion, instead of its Milestones summary, it would still be liable under the rationale of the Florida Supreme Court. For that decision

Such a stultifying result cannot be squared with the First Amendment and the cited decisions of this Court emphasizing the public's right to be informed of judicial proceedings. Published reports of judicial proceedings, like discussions of public officials and public figures, cannot give rise to liability for defamation unless the defamatory statements are made with "actual malice" in the *New York Times* sense. The First Amendment values which protect discussion of public officials apply with equal force to discussion of judicial proceedings. The opinion in *New York Times* itself strongly suggests that reports of judicial proceedings should enjoy the protection of the "actual malice" standard, at least insofar as the reports concern the conduct of judges. 376 U. S. at 272-73. And Dean Prosser has concluded that the *New York Times* rule applies to the privilege for reporting judicial proceedings, noting that "it seems beyond dispute that even if the report is an inaccurate one, it is privileged unless it is made with knowledge of the falsity or in reckless disregard of its truth." *Prosser on Torts* 832 (4th ed. 1971).

Since it is abundantly clear that petitioner's discussion of the Firestone divorce case was not published with "actual malice", petitioner cannot constitutionally be held liable for any defamation resulting from its publication.

4. Additionally, the result below cannot be squared with this Court's decisions in *Butts* and other cases that public

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conveyed to the public exactly what petitioner reported—that respondent had been divorced on grounds of extreme cruelty and adultery.

Delay is also inevitable. In many instances it will be some time before the exact decision can be obtained. Further delay would result from the need to flyspeck the decision for error. Even in the case of decisions of this Court, such requirements would substantially delay reporting—decisions rendered on a Monday, which are now routinely reported throughout the country on Monday evening or Tuesday morning, could not possibly be reported upon until the end of the week. And even then a publisher would be liable if he printed a decisional error defaming someone.

figures must prove "actual malice" to recover for defamation. Under all relevant tests, respondent was a "public figure". Indeed, the Milestones section in TIME magazine is limited to "important events in the lives of important people" as testified by writer Doerner at the trial (Tr. p. 348). Respondent was "drawn into a particular public controversy" (*Gertz*, p. 351), indeed she initiated it, and "commanded a substantial amount of independent public interest" (*Butts*, p. 154).

The Supreme Court of Florida pointedly ignored this point in its second opinion (Appendix C). In its first opinion it noted the facts making respondent a public figure (271 So. 2d 751, Appendix A):

> "We now review the pertinent facts in this case in the light of the foregoing observations. As noted, petitioner and her ex-husband were well known. They were prominent among the '400' of Palm Beach society, and were also active members of the sporting set. Sadly, however, their marital difficulties were equally well known; and the charges and counter-charges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable *cause celebre* in social circles across the country. Additionally, as the District Court observed:
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> > 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
> >
> > The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .'

> Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto."

Having noted those facts, the Florida Supreme Court failed to reach the necessary conclusion—that respondent was a public figure who had to prove "actual malice" under the applicable decisions of this Court. Instead, the Florida Supreme Court, in the teeth of its factual recital, held that petitioner's report was "not constitutionally protected as being matters of *real* public or general concern" (italics added). This holding, with its clear implication that the Florida Supreme Court will decide what the public *really* should read, underscores the failure of that Court to follow this Court's decisions and the consequent need for correction here as in *Tornillo*.

5. Finally, the "actual malice" standard also applies under the *Hill* decision since, any claim for damage to reputation having been withdrawn, respondent is in essentially the same position as plaintiff Hill, which necessitates the same test.

With the withdrawal of any claim for damages to reputation, no claim exists under the Constitution for pain and suffering resulting from the use of language—noteworthy in this regard is the fact that all constitutional cases in this Court dealing with libel have stressed that any limitations upon the use of language imposed were because of the state interest in protecting reputation. *Garrison,* p. 73, *Rosenblatt,* p. 86, *Hill,* p. 391, *Butts,* p. 135, *Monitor Patriot,* pp. 270, 276, *Pape,* p. 284, *Metromedia,* pp. 48-49, *Gertz,* pp. 347-48. But once the state interest in protecting reputation is withdrawn, which it necessarily was when respondent here withdrew her claim for damage to reputation, there is then no state interest left to protect. It accordingly follows,

constitutionally, that petitioner's right to say what it pleases must be governed solely by an "actual malice" test under the First Amendment.

In sum, it appears here, as in *Tornillo,* that the Florida Supreme Court's failure to observe the guarantees of the First Amendment again requires this Court's corrective action.

CONCLUSION

If the constitutional guarantee of a free press is to mean anything as against a State Supreme Court which pays lip service to but ignores the decisions of this Court, this case must be reviewed.

For the reasons stated, the petition should be granted.

January 30, 1975.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinion and Order of the Supreme Court of Florida December 20, 1972, Directing the District Court of Appeal Further to Consider the Case

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MARY ALICE FIRESTONE, Petitioner,

v.

TIME, INC., Respondent.

No. 41868.

Supreme Court of Florida.

Dec. 20, 1972.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes, Jacksonville, for petitioner.

William S. Frates and Larry S. Stewart, of Frates, Floyd Pearson, Stewart, Proenza & Richman, Miami, and Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, for respondent.

McNULTY, District Judge.

We review this day a libel action arising out of a publication in the "Milestones" column of Time magazine relating to a divorce between petitioner and her husband. Our jurisdiction is predicated on conflict which will hereinafter appear.

The assailed publication is as follows:

> "Divorced. By Russel A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school-

> teacher; on grounds of extreme cruelty and *adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'" (Italics added)

The truth is, the divorce was *not* granted on the grounds of adultery.[1] Furthermore, there was no express finding in the judgment of divorce that either of the parties was guilty of marital infidelity, although the trial judge did allude to testimony offered in that regard and commented thereon in the language quoted in the article. As to this, however, the article failed to note that the trial judge expressly stated that he was "inclined to discount much of this testimony as unreliable."[2]

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[1]In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge "did not find the wife guilty of adultery." Rather, it was pointed out that the divorce was granted for lack of "domestication," in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of "extreme cruelty," the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223.

[2]The relevant portion of the final judgment in this regard is set forth as follows:

> "According to certain testimony in behalf of the defendant, extra-marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . ."

In any case, in this libel action the District Court reversed a judgment in favor of plaintiff-petitioner, concluding that because the petitioner's ex-husband was an heir to the immense Firestone rubber fortune, and because their divorce action itself together with sensational pre-divorce marital difficulties had received nationwide publicity, the foregoing publication was constitutionally protected under the First Amendment of the United States Constitution as being "an event of great public interest" within the rationale of the so-called "New York Times doctrine."[3]

I

The paramount question we must answer, therefore, is whether the publication herein, under the circumstances of its making, is thus constitutionally protected. If it is, then the New York Times standard does apply, viz., assuming a defamatory falsehood, petitioner must prove, with convincing clarity, actual malice, i.e., knowledge of the falsity or a reckless disregard of whether it was false or not.[4] If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privi-

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[3]*See,* Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, citing, New York Times v. Sullivan (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686.

[4]*Id. See, also,* St. Amant v. Thompson (1968), 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262.

leged,[5] is actionable absolutely and no malice need be shown[6]—truth being the only defense.[7]

As noted, the District Court concluded that the publication herein was constitutionally protected and applied the New York Times standard, *supra.* We disagree; and herein lies the predicate for jurisdictional conflict. For it is the conflict of *decisions,* not of *opinions* or *reasons,* which supply jurisdiction for review by certiorari[8]. If, therefore, the District Court erroneously categorized the Firestone divorce action as an event of "great public interest" within the discipline of *New York Times,* and thereby imposed a greater burden on petitioner than would otherwise be the case under settled Florida libel law, then its decision is in conflict with Florida law on the subject which was left unassailed by *New York Times* and its progency *except* to the extent of publication of matters of "great public interest" *as that term is correctly construed.* We are thus faced with circumscribing "matters of great public interest."

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[5]*See, e.g.,* Hauser v. Urchisin (Fla. 1970), 231 So. 2d 6 (*absolute* privilege for statement by public official in connection with his duties); St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, P. A. (Fla. App. 1967), 196 So. 2d 219 (*absolute* privilege for statements made *in* judicial proceedings); Walsh v. Miami Herald Publishing Co. (Fla. 1955), 80 So. 2d 669 (*qualified* privilege for reports *of* judicial proceedings); Murphy v. Daytona Beach Humane Soc. (Fla. App. 1965), 176 So. 2d 922 (*qualified* privilege in commenting on matter of public interest); and Leonard v. Wilson (Fla. 1942), 8 So. 2d 12 (*qualified* privilege for good faith character reports or references).

[6]*See, e.g.,* Teare v. Local Union No. 295 (Fla. 1957), 98 So. 2d 79; Hartley & Parker, Inc. v. Copeland (Fla., 1951), 51 So. 2d 789; and Commander v. Petersen (Fla. 1934), 156 So. 337.

[7]*See,* Fla. Const. D. R. § 4, F. S. .A. *See, also,* Florida Pub. Co. v. Lee (Fla. 1918), 80 So. 245.

[8]*See,* Gibson v. Maloney (Fla. 1970), 231 So. 2d 823. *See, also,* Fla. Const., Art. V, § 4(2).

II

To begin with, the term "matters of public or general concern" is more apt, as will become obvious, than the expression "matters of great public interest," and we prefer it. Conceptually, it is public *concern* which clearly underlies the *ratio decidendi* of the entire line of Supreme Court cases beginning with *New York Times;* and the concept was ultimately resolved in Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 91 S. Ct. 1811, 26 L. Ed. 2d 296.[9]

> ". . . It is clear that there has emerged from our cases decided since New York Times the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of *public or general concern,* albeit leaving the delineation of the reach of that term to future cases." (Italics ours)

Now, it is implicit in these decisions, terminating with *Metromedia,* that not *all* news items or feature articles are

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[9](1971), 403 U. S. 29, 44, 91 S. Ct. 1811, 1820, 29 L. Ed. 2d 296.

constitutionally protected.[10] It must be taken as true, on the other hand, that "newsworthiness" is that which is well calculated to generate wide reader interest and thus may be a legitimate area of exploitation by the communications media. But we perceive a clear distinction between mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and *real public or general concern* on the other.

What, then, are matters of real public or general concern? Most obvious, of course, are matters relating to governmental affairs, which necessarily involve public officers, public servants and employees and even candidates for public office. Both the public and private activities of these people, to the extent that they relate to performance of their duties or their qualifications or fitness for public service are clearly matters of public concern.

But public concern is not limited to matters governmental. As was said, again in Metromedia:[11]

> ". . . the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders . . . felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' [Curtis Publishing Co. v. Butts, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)], Id., at 147, 87 S. Ct., at 1987, 18 L. Ed. 2d at 1107 (opinion of Harlan, J.). Comments in

[10]If *all* news were protected, there would, of course, be no need for a "public concern" category. It should be noted, however, that Justice Douglas disagrees and would extend the protection to include all news items. See his concurring opinion in Garrison v. Louisiana (1964), 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125. This view was shared by the late Justice Black and is apparent in his concurring opinion in *Metromedia, id.*, at 57, 91 S. Ct. 1811, 29 L. Ed. 2d 296.

[11]Note 9, *supra*, at 42, 91 S. Ct. at 1819.

> other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In Time, Inc. v. Hill, supra, we had 'no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest,' 385 U. S. [374,] at 388, 87 S. Ct. [534] at 542, 17 L. Ed. 2d 456 at 467, which was entitled to constitutional protection. Butts held that an alleged 'fix' of a college football game was a public issue. Associated Press v. Walker, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), a companion case to Butts, established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as well as the scope, of the 'profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U. S. at 270-271, 84 S. Ct. at 721, 11 L. Ed. 2d at 701, 95 A. L. R. 2d 1412."

Thus, it appears, it can be broadly said that matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters as sporting events,[12] the performing and fine arts,[13] morality and religion,[14] the sciences,[15] and matters

[12]*See*, Time, Inc. v. Johnston (4th Cir. 1971), 448 F. 2d 378.

[13]*See*, Time, Inc. v. Hill (1967), 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; and Man v. Warner Bros., Inc. (S. D. N. Y. 1970), 317 F. Supp. 50.

[14]*See*, Gospel Spreading Church v. Johnson Pub. Co. (1971), 14 U. S. App. D. C. 207, 454 F. 2d 1050; and Spern v. Time, Inc. (W. D. Pa. 1971), 324 F. Supp. 1201.

[15]*See*, United Med. Laboratories, Inc. v. C. B. S. (9th Cir. 1968), 404 F. 2d 706.

relating generally to the health, well-being and general comfort of the public *as a whole.*[16] Accordingly, news items or featured articles or commentaries by communications media relating to these matters are and should be constitutionally protected notwithstanding that obscure *or* prominent individuals may be caught up in the current and regretfully defamed. That this is the law is again postulated in *Metromedia*:[17]

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication *involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Italics added)

[16]*See, e. g.,* United Med. Laboratories, Inc. v. C. B. S., note 15, *supra* (health); Cullen v. Grove Press, Inc. (S. D. N. Y. 1967), 276 F. Supp. 727 (hospital for the criminally insane); Time, Inc. v. Ragano (5th Cir. 1970), 427 F. 2d 219 (organized crime); DeSalvo v. 20th Century Fox (D. Mass. 1969), 300 F. Supp. 742 (notorious individual crime); Dacey v. Florida Bar, Inc. (5th Cir. 1970), 427 F. 2d 1292 (probate matters); Cervantes v. Time, Inc. (8th Cir. 1972), 464 F. 2d 986 (corruption of government official); Novel v. Garrison (N. D. Ill. 1971), 338 F. Supp. 977 (assassination of a president); and Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970), 426 F. 2d 858 (decline of famous hotel).

[17]Note 9, *supra,* at 43, 91 S. Ct. at 1819.

A fortiori, if one *by his own volition* thrusts himself on the passing scene to the extent that he knowingly and consciously wants and needs publicity or public support for his endeavors or activities he *surely* submits himself to public scrutiny, which oftentimes may justly expose his private affairs as they might relate to the activities or endeavors for which he is seeking public approval.[18] Justice Terrell aptly noted this maxim in Kennett v. Barber:[19]

> ". . . one . . . who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval. Cason v. Baskin, Fla., 30 So. 2d 635."

III

But while we agree to all this, we are nevertheless strongly persuaded from our reading of the cases that a line must be drawn somewhere. For instance, Mr. Justice Brennan said in *Metromedia*:[20]

> "Further reflection over the years since New York Times was decided persuades us that the view of the 'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either

[18]*See,* Ocala Star Banner Co. v. Damron (1971), 401 U. S. 295, 91 S. Ct. 628, 28 L. Ed. 2d 57. *See, also,* Gibson v. Maloney, note 8, *supra.*

[19](Fla. 1947), 159 Fla. 81, 31 So. 2d 44, 46.

[20]Note 9, *supra,* at 47, 91 S. Ct. at 1822.

to the values protected by the First Amendment or to the nature of our society. We have recognized that '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.' Time, Inc. v. Hill, supra, 385 U. S. at 388, 87 S. Ct. at 542, 17 L. Ed. 2d at 467. Voluntarily or not, we are all 'public' men to some degree."

However, he went on:

"Conversely, some aspects of the lives of even the Most public men fall outside the area of matters of public or general concern. See n. 12, supra; Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are *not* in the area of public or general concern." (Italics added)

And even though the court held in that case that the subject matter of the questioned publication therein was clearly a matter of public or general concern, the court in a footnote went out of its way to recognize the point we make here;[21]

[21] *See,* note 12 in *Metromedia,* note 9 *supra,* at 44, 91 S. Ct. at 1820.

"We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities *not* within the area of public or general interest." (Italics added)

We hold up to the proposition, therefore, that regardless of the prominence of the person defamed there still may be a sector of his private life which is of no real concern to the public; and this private sector should be as zealously protected from defamation as is the right of the public to be concerned, and thus informed, about the public sector of his life.[22]

IV

So recognizing the pre-eminence of real public concern *vis a vis* the private affairs of the prominent or anonymous individual in terms of First Amendment sanctions, how, then, constitutionally to balance the rights of each to the extent it is legally possible to do so? The problem is a bifurcated one, obviously. We either must determine when or at what point the private activities of a public or prominent figure become the real concern of the public; or, alternatively, we must determine when conduct, or an event or series of events, or an historical occurrence or happening, or other noteworthy and recordable occasion, involves a *subject* of true public concern.

[22] *See, also,* Belli v. Orlando Daily Newspapers, Inc. (5th Cir. 1967), 389 F. 2d 579, 587; and Buckley v. Esquire, Inc. (S. D. N. Y. 1972), 344 F. Supp. 1133.

In either case, we think that as a workable test the question is whether there is a *logical relationship* between the reported activities of the prominent person, or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public. This is clearly a matter of *law,* since reasonable men cannot differ on what is logical although logical men may differ on what is reasonable. Thus a publisher need not gamble on whether a given jury may reject as unreasonable his decision that a proposed publication involves a matter of public or general concern. He need only exercise *responsible judgment* in the premises, which is the least that's expected of him to begin with. He would exploit mere sensationalism at his own risk.

We cannot, of course, nor need we, attempt to hypothesize the manifold factual situations on either side of the question. Suffice it here to make note of the judiciousness suggested in *Metromedia:* ". . . the delineation of the reach" of the term "issue of public or general concern" ought be left to "future cases."[23] This is one of those future cases.

V

We now review the pertinent facts in this case in the light of the foregoing observations. As noted, petitioner and her ex-husband were well known. They were prominent among the "400" of Palm Beach society, and were also active members of the sporting set. Sadly, however, their marital difficulties were equally well known; and the charges and counter-charges of meretriciousness, flowing from both sides of the controversy, made their divorce action a vertiable *cause celebre* in social circles across the country. Additionally, as the District Court observed:[24]

[23]*See,* note 9, *supra,* 91 S. Ct. 1811, 29 L. Ed. 2d 296.
[24]Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 389.

> "The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
>
> The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . ."

Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto.

But withal, we are committed to the view that neither wealth, social position nor fame, of themselves, render the private affairs of those involved amenable to constitutionally protected unbridled public scrutiny under the guise of public or general interest. That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general *concern.* Applying the suggested test, where in this case is the logical relationship between the marital difficulties of the Firestones and real public concern? The matter certainly doesn't inhere significantly within the areas of public concern we categorized earlier;[25] and no category otherwise can be articulated except prurient curiosity, which we reject as too frivolous a predicate upon which to expend constitutional energies.

[25]While martial infidelity is still within the scope of "morality," notwithstanding this "enlightened age," that involved in a given marriage is not, significantly, a matter of any great public importance.

We would arrive at a different conclusion, no doubt, if (as in the celebrated case of a renowned conductor of the London Symphony who was sued for divorce some few weeks after publishing a book offering advice on martial bliss) one or the other of the parties herein were a profession marriage counselor. Obviously, in such case as an illustration, there would be a logical connection between the divorce action and the inquiring concern of the public whose patronage is sought. Likewise, as another and concrete, example, if the divorce were peripherally, or even prominently, alluded to in an exposé or feature article essentially exploring some other subject of legitimate public inquiry, such as the exposé of widespread wiretapping and "snooping" published in Life magazine which gave rise to another libel action between the parties hereto in the federal courts,[26] there would again be a valid basis for constitutional protection.[27] But we cannot find here any aspect of real public concern, and none has been shown to us, which would be furthered or enhanced by "free discussion" and "robust debate" about the divorce of Russell and Mary Alice Firestone.

Nor did petitioner's quoted interviews with the press raise the untidy affair to the dignity of true public concern. Unlike an actress who might grant interviews relating to

[26]See, Firestone v. Time, Inc. (5th Cir. 1972), 460 F. 2d 712.

[27]We do not mean to say, however, that a publisher can create his own "matter of public concern" and thereby defame others. We seriously doubt, for example, that Dr. Kinsey without obvious good purpose could have brought into constitutionally protected public focus the identity of those who formed a statistical basis for his "reports." On the other hand, a *bona fide* and responsible inquiry into the validity of the good doctor's reports (which we certainly don't impliedly impugn) could well in an extreme case subject persons involved in such reports to privileged public exposure. In either case, it is assumed, the resolved issue of "actual malice" would determine any question of "bootstrapping," i.e., creating a springboard from which to merely defame or sensationalize.

the opening of her new play, petitioner was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.

In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern.

VI

There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be "conditionally privileged" under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co.[28] and Shiell v. Metropolis Co.[29] This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision. But the court disposed of all these matters by saying:[30]

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error

[28](Fla. 1955), 80 So. 2d 669.

[29](Fla. 1931), 136 So. 537.

[30]Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 387.

> we deem it judicious to only plumb one area, constituional privilege, better known as the New York Times doctrine."

Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.

Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith.

ERVIN, CARLTON and DEKLE, JJ., concur.

ROBERTS, C. J., concurs specially with opinion.

ROBERTS, Chief Justice (concurring specially).

I concur in the opinion and judgment for the reasons stated and for the further reason that the libel was perpetrated by a weekly rather than a daily publication. In Ross v. Gore, 48 So. 2d 412 (Fla. 1950), and Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (Fla. 1955), this Court commented that daily publications operate against stringent deadlines for the reason that the American public has come to demand "Today's news today". A reporter is expected to determine the facts in a matter of hours or minutes and it is only reasonable to expect that mistakes will be made.

In recognition of this fact, our state legislature has provided in Section 770.02, Florida Statutes, F. S. A., for correction, apology, or retraction by newspaper.

This statutory provision provides as follows:

> "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

This retraction law excuses the newspaper from most of its liability if a simple correction and retraction of the inadvertent misstatement is made by publication in the same editions or corresponding issues of the newspaper.

However, a weekly publication does not have such stringent deadlines as the daily publications and can take the necessary time to fully explore the truth or falsity of a news item.

Section 4 of our Declaration of Rights (Article I, Constitution of Florida) guarantees that, "Every person may speak, write and publish his sentiments on all subjects *but shall be responsible for the abuse of that right.*" In overdramatizing the news item sub judice, the magazine simply closed its eyes to that portion of our constitution which says, "but shall be responsible for the abuse of that right".

The daily newspapers in Florida have not hesitated to retract and correct inadvertent misstatements in accordance with Section 770.02, Florida Statutes, F. S. A. Time, Inc., magazine was afforded the same opportunity, but refused to take advantage of this statutory provision.

APPENDIX B

APPENDIX B

Opinion and Order of the District Court of Appeal June 20, 1973, Directing Entry of Judgment for Petitioner

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TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

June 20, 1973.

Rehearing Denied July 11, 1973

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, Judge.

UPON SUPREME COURT MANDATE

This appeal is back before us per Mandate of the Florida Supreme Court based on its opinion and judgment reported as Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745. Faithful to its requirement, we vacate our opinion

reported as Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, insofar as it found merit in appellant's Point III:

> If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of New York Times v. Sullivan.

And now to the dilemma and our perplexity. What is our present duty and the requirement of law as concerns the treatment and disposition of appellant's remaining points? These points are:

POINT I

Whether there is a cause of action for libel without damage to reputation.

POINT II

Whether the publication fairly and accurately reported the final judgment.

POINT III

(Determined by the Supreme Court to be without merit in Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745.)

POINT IV

If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of common law qualified privilege for reports of judicial proceedings.

POINT V

Whether the defendant was denied a fair and impartial trial by plaintiff's counsel's appeals to passion and prejudice.

POINT VI

Whether plaintiff established any recoverable compensatory damages.

We chronicle:

When we undertook the determination of this appeal initially we considered each and every appellate point in depth and decided them in accordance with our understanding of law and the appellate function. We adjudged that Point V was without merit and apparently this decision has been accepted by the Supreme Court and the litigants. We decided that the remaining points had reversible merit, and reversed and remanded with instructions to enter a final judgment in favor of appellant, Time, Inc. It was our notion then and now that the litigants and the trial court (and the Supreme Court, upon the granting of certiorari) would surely know by reference to the points, which are of record, the reasons for our decision and the precise action to be taken by the trial court. This is to be distinguished from an instance where there is a naked reversal without directions or reference to any specific points on appeal, as Scott v. Rosenthal, Fla. App. 1960, 118 So. 2d 555; Fla. 1961, 131 So. 2d 480, and such instance as where there is not a majority opinion leaving the trial court without guidance on remand. Leveson v. State, Fla. App. 1962, 138 So. 2d 361; Fla., 147 So. 2d 524. Neither is this a case where jurisdiction is in issue and basis therefor unclear. Rosenthal v. Scott, supra; State v. Bruno, Fla. 1958, 104 So. 2d 588.

We assume that the litigants understood that we had fully adjudicated all points based upon the Supreme Court remark,[1]

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[1]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, ¶ VI, p. 753.

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court." And so it appears to us that *all points* and decisions as to them were presented to the Supreme Court for certiorari review.

By way of hindsight, we wish that we had more artfully expressed our decision inasmuch as it, in application, has apparently been misunderstood or overlooked upon further appellate review. We said the following[2]:

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. *We conclude that there is merit,* to various degrees, *to each point on appeal with the exception of number 5, passion and prejudice.* Since we find a multitude of reversible error we deem is judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine." (Emphasis supplied.)

Our decision to write an expanded opinion only upon Point III was based upon our interpretation of Canon 19 of the Canons of Judicial Ethics[3] and our concept of the

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[2]Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, at p. 387.

[3]Canons of Judicial Ethics, 19 Judicial Opinions.

"* * *

"It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

"But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be

tenets of judicial professionalism and tradition. We selected it simply because we thought it central and felt its determination would be of the largest service to the litigants, Bench and Bar. We deliberately did not discuss each of the points in detail because of the volume that would result and the basic fact that time and resource limitations preclude written opinions on each and every point presented in every brief. No court rule, statute, or court opinion requires such treatment to our knowledge. Of course, had we known at the time that our Point III opinion would not survive, we would have chosen another point to discuss in depth as a basis for reversal.

We deliberately did decide the merit of each point presented in an effort to be of assistance to the Supreme Court in case certiorari would be granted. We did this, too, in order to save the yo-yo or ping-pong effect of passing the appeal back and forth between the two courts with decisions being made a point at a time. Theoretically, there being six points, there could be twelve appellate presentations and twelve written opinions if this appeal were decided piecemeal, a point at a time, with the District Court being quashed in each instance. See Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So. 2d 594, at 596, where it is said:

> "Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial or delay.' *Piecemeal determination of a cause by our appellate court should be avoided and when a*

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published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

"* * *."

case is properly lodged here there is no reason why it should not then be terminated here. In the Lissenden case [P. C. Lissenden Co., Inc. v. Board of County Commissioners of Palm Beach County, Fla., 116 So. 2d 632] we said, with respect to appeals and in discussing an analogous matter '[m]oreover, the efficient and speedy administration of justice is * * * promoted' by doing so." (Emphasis supplied.)

The Supreme Court in the instant case said with reference to this problem[4]:

"There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be 'conditionally privileged' under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co. [(Fla. 1955), 80 So. 2d 669] and Shiell v. Metropolis Co. [(1931), 102 Fla. 794, 136 So. 537]. *This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision.* But the court disposed of all these matters by saying: [Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, 387]

'Time has presented six cogent points on appeal. We have examined all briefs, transcripts

[4]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, at p. 752.

and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.'

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, *we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.* (Emphasis supplied.)

"Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith."

We gather that the gravamen of the above passage is that we are being directed "* * * initially to pass on the full merit of the remaining points raised." We, in all respect, interpret this to mean that our earlier decision on the points is being overlooked and we are directed to write an opinion on each of the four remaining points.

It is our respectful view, based on the foregoing, that there is a misunderstanding or lack of communication between our two courts.

We feel that the Supreme Court has been in nowise embarrassed or limited by our action and procedure. The Supreme Court, itself, has said that "* * * once we take jurisdiction of a case upon petition for a writ of certiorari we may take it for all purposes as though it had come originally on appeal to the Supreme Court." Mark v. Hahn, Fla. 1965, 177 So. 2d 5, at page 9, citing Tyus v. Apalachicola Northern R. R. Co. (Fla. 1961), 130 So. 2d 580; Zirin v. Charles Pfizer & Co. (Fla. 1961), 128 So. 2d 594; Adjmi v. State (Fla. 1963), 154 So. 2d 812; Hedges v. State (Fla.), 172 So. 2d 824; Florida Real Estate Commission v. Harris (Fla.), 134 So. 2d 785. See also Schoenrock v. Ballard, Fla. App. 1966, 185 So. 2d 760. Thus, it is clear that the Supreme Court had the power without hindrance to consider, review and decide all appellate points when it took jurisdiction and such action would avoid the needless additional steps condemned in Zirin v. Charles Pfizer & Co., supra.

We also note that the litigants are not entitled to a written opinion on each or any point as a matter of constitutional right. Taylor v. Knight, Fla. App. 1970, 234 So. 2d 156.

Without laboring the matter further, if it was the intendment of the Supreme Court to cause this court to reconsider its earlier decision and to write an opinion on each of the points supporting our decision, we must most respectfully decline upon the rationale and reasoning contained in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907; Young Spring & Wire Corp. v. Smith, Fla. App. 1965, 172 So. 2d 238; Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., Fla. App. 1965, 172 So. 2d 248; Home Development Co. of St. Petersburg v. Bursani, Fla. App. 1965, 176 So. 2d 100; and Hoisington v. Kulchin, Fla. App.

1965, 178 So. 2d 349. We specially agree with the rationale stated in Hoisington v. Kulchin, supra:

> "For the reasons set forth in the second opinion of this court in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907, we must respectfully decline, at this late date, to reconsider the cause and set forth the basis and reasoning for our decision. This is not to say that we do not recognize the paramount responsibility of the Supreme Court of Florida to supervise the judicial system of Florida. Our disinclination to comply with the request is based upon our concern for the proper function of this court in the judicial system of Florida; for to comply with the request would be to make an advocate of this Court if it should attempt to set forth the basis of its reasoning after its jurisdiction has expired.
>
> "Courts, be they trial or appellate, should at all times adhere to an atmosphere of cold neutrality and, at this stage of these proceedings, to write an opinion supporting a decision in favor of the appellees would in effect destroy the cold neutrality of impartiality and would relegate the court to an advocate who, by nature, must be partial."

Thus, in conclusion, we vacate our opinion reported at 254 So. 2d 386, in favor of the Supreme Court opinion reported at 271 So. 2d 745, insofar as it disposes of appellant's Point III.

Not newly, but by way of confirmation of our initial decision, reported at 254 So. 2d 386, we adjudicate that appellant's Points I, II, IV and VI have merit sufficient to

cause the reversal of the appealed judgment and entry of judgment for the defendant, Time, Inc.

In other words, we held as the basis and reason for our prior decision by reference and in the language of the points:

I. There is no cause of action for libel without damage to reputation.

II. The publication fairly and accurately reported the final judgment.

IV. Plaintiff's proofs were insufficient under the doctrine of common law privilege for reports of judicial proceedings.

V. Defendant was not denied a fair and impartial trial by plaintiff's counsel's appeal to passion and prejudice.

VI. Plaintiff did not establish any recoverable compensatory damages.

We do, therefore, adhere to our decision expressed in 254 So. 2d 386, to reverse the trial court and direct entry of judgment in favor of the defendant, Time, Inc., because of the reversible errors covered by Points I, II, IV, and VI.

It is so ordered.[5]

REED, C. J., and OWEN, J., concur.

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[5]We recognize, of course, that if the ligitants continue to be aggrieved and in case we have erred or misconstrued, the Supreme Court of Florida continues to have jurisdiction to correct and implement its mandate and, in the ultimate, to cause the disposition of this appeal in accordance with its views of the law. See generally 2 Fla. Jur., Appeals, §§ 387, 391.

APPENDIX C

APPENDIX C

Opinion and Order of the Supreme Court of Florida December 11, 1974, Directing Entry of Judgment for Respondent

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1974

MARY ALICE FIRESTONE,
Petitioner,
v.
TIME INC.,
Respondent.

Case No. 44,207
DCA Case No. 70-802

Opinion filed December 11, 1974

Writ of Certiorari to the District Court of Appeal, Fourth District

Robert M. Montgomery, Jr. and Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hall-lowes, for Petitioner

William S. Frates and Larry S. Stewart of Frates, Floyd, Pearson, Stewart, Proenza and Richman; and Harold R. Medina, Jr. of Cravath, Swaine and Moore, for Respondent

PER CURIAM.

This cause is before us on certiorari granted to review the decision of the District Court of Appeal, Fourth District, in *Time, Inc.* v. *Firestone,* opinion filed June 20, 1973, reported at 279 So. 2d 389 (Fla. App. 1973), which purportedly conflicts with *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Montgomery* v. *Knox,* 3 So. 211 (Fla. 1887), *Myers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla.

1907), *Tip Top Grocery Co.* v. *Willner,* 186 So. 219 (Fla. 1938), *Miami Herald Pub. Co.* v. *Brown,* 66 So. 2d 679 (Fla. 1953), *McCormick* v. *Miami Herald Publish. Co.,* 139 So. 2d 197 (Fla. 1962), and *Hammond* v. *Times Publishing Co.,* 162 So. 2d 681 (Fla. App. 1964). We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, 1973.

Petitioner, herein, seeks review of the latest in a series of District Court opinions relative to her libel suit against respondent for publication of the following news item about petitioner:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune. Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on the grounds of extreme cruelty and *adultery;* after six years of marriage; one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl'." (emphasis supplied)

The decree of divorce was granted not on grounds of adultery but rather was granted on grounds of extreme cruelty. In the final judgment granting the divorce, the trial court found the equities to be with Mrs. Firestone and awarded her substantial alimony. Additionally, the trial court although stating that enough testimony had been introduced to make Dr. Freud's hair curl, specifically stated in the final judgment that the court was inclined to discount much of the testimony as unreliable.

After publication of the aforestated news item, petitioner demanded in writing a retraction of the article and alleged

that it was false, malicious and defamatory. The respondent declined to retract.

Complaint was thereafter filed by petitioner alleging that respondent had maliciously prepared, composed, published and distributed the above-described defamatory article. Summary judgment was entered by the trial court in favor of respondent. However, upon appeal of this summary judgment to the District Court of Appeal, Fourth District, that court, finding that there were genuine issues of material fact to be resolved by the trier of fact, including, inter alia, the question of malice, reversed and remanded the cause to the trial court. *Firestone* v. *Time, Inc.,* 231 So. 2d 862 (Fla. App. 1970), cert. denied 237 So. 2d 754. Upon remand, after trial by jury, verdict having been entered in favor of petitioner and against respondent, in the sum of $100,000, the trial court entered final judgment ordering that petitioner recover said sum from respondent.

Upon appeal, the District Court of Appeal, Fourth District, reversed the judgment primarily on the ground that the divorce was an event of great public interest within the rationale of *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), and that there was no malice on the part of Time, Inc. shown as required for recovery under the doctrine of *New York Times* v. *Sullivan,* supra.

This Court granted certiorari and reversed the above decision of the District Court on the basis that the publication did not come within the New York Times doctrine, specifically stating:

> "In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern." *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972).

However, this Court did not decide the remaining points raised by respondent, but rather remanded to the District Court, stating:

> "Respondent argues essentially the same points here, with the exception of the passion and prejudice point, rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points."

Upon remand to reconsider the remaining points raised on appeal, in a decision entitled "Upon Supreme Court Mandate," *Time, Inc.* v. *Firestone,* 279 So. 2d 389 (Fla. App. 1973), the District Court stated that it assumed that all litigants understood that all points raised on appeal had been adjudicated in its prior decision. Noting that the litigants are not entitled to a written opinion on each and every point, the District Court, by way of confirmation of its initial decision reported at 254 So. 2d 386, adjudicated without explanation that Time, Inc.'s Points I, II, IV and VI, as specifically delineated in its decision, have merit sufficient to cause reversal of the appealed judgment and entry of judgment for Time, Inc.

We cannot agree with the decision of the District Court which reverses the judgment of the trial court. As previously stated herein, the truth is that the divorce was *not* granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity. This Court in *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972), in a pertinent footnote expressly stated:

> "In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge 'did not find the wife guilty of adultery.' Rather, it was pointed out that the divorce was granted for lack of 'domestication,' in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of 'extreme cruelty,' the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223."

The appropriate statutory procedure was followed by petitioner in requesting retraction of the defamatory publication which is the subject of this suit, Sections 770.01 and 770.02, Florida Statutes, *Ross* v. *Gore,* 48 So. 2d 412 (Fla. 1950), but respondent elected not to retract and must stand upon the accuracy of its statements. *Walsh* v. *Miami Herald Publishing Co.,* 80 So. 2d 669 (Fla. 1955). The statement that the divorce was granted on grounds of adultery is totally inaccurate.

The false accusation of a woman of adultery is libelous per se. *Layne* v. *Tribune Co.,* 146 So. 234 (Fla. 1933), *Harriss* v. *Metropolis Co.,* 160 So. 205 (Fla. 1935), *Sharp* v. *Bussey,* 187 So. 779 (Fla. 1939), 20 Fla. Jur. Libel and Slander, Section 20, 50 Am. Jur. 2d Libel and Slander, Section 60, Restatement of the Law of Torts, Chapter 24, Section 569 f.[1] Words which amount to libel per se import

[1]Not only does the statement that a woman has committed adultery impute unchastity but furthermore it imputes to another conduct constituting a criminal offense. Section 798.01, Florida Statutes,

damages and malice and are actionable in and of themselves without allegation or proof of special damages. *Briggs* v. *Brown,* 55 Fla. 417, 46 So. 325 (Fla. 1908), *Johnson* v. *Finance Acceptance Co. of Georgia,* 159 So. 364 (Fla. 1935), *Cooper* v. *Miami Herald Pub. Co.,* 31 So. 2d 382 (Fla. 1957), *Campbell* v. *Jacksonville Kennel Club,* 66 So. 2d 495 (Fla. 1953). Relative to the presumption of recoverable compensatory damages, this Court stated in *Commander* v. *Pedersen,* 156 So. 337 (Fla. 1934):

> "The law applicable to the case under consideration appears to be stated in 17 R. C. L. 263 et seq., as follows:
>
> ". . .
>
> ". . . In the case of words actionable per se their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judical [sic] notice of it. They necessarily import damage, and therefore in such cases general damages need not be pleaded or proved . . ., and special damage need not be shown to sustain the action. Moreover, malice is presumed as a matter of law in such cases. . . ."

The Supreme Court of the United States in *Gertz* v. *Welch, Inc.,* opinion decided June 25, 1974, has recently stated that,

> "It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther

provides: "Living in open adultery.—Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section."

> than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence *which caused actual damages* to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that "It is *only damages which are a direct and natural result of the alleged libel* which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence." (emphasis supplied). The jury heard the testimony and considered the evidence before

it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in *Gertz,* supra, and upon the evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in *Gertz,* supra, recognized that there need be no evidence which assigns an actual dollar value to the injury.

We must also emphasize that the trial court specifically instructed the jury that,

> "I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of *Firestone* v. *Firestone,* Case No. 64 C 2790C. *McCormick* v. *Miami Herald Publishing Co.,* 139 So. 2d 197 (2nd DCA 1962)."

Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In *McCormick* v. *Miami Herald Publishing Company,* 139 So. 2d 197 (Fla. App. 2, 1962), the court stated that a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. See also, *Hammond* v. *The Times Publishing Co.,* 162 2d 681 (Fla. App. 2, 1964). Evidently, the jury determined sub judice that the article in question would have a different effect.

In *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972), relative to the statement herein involved, this Court explained:

> "If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privileged, is actionable absolutely and no malice need be shown—truth being the only defense."

Publications of judicial proceedings under the laws of Florida are only qualifiedly privileged *if* they are fair and impartial *and also* accurate in regard to all material matters. *Shiell* v. *Metropolis Co.,* 136 So. 537 (Fla. 1931), *Walsh* v. *Miami Herald Publishing Co.,* supra. If a statement is qualifiedly privileged and is made without malice, then no cause of action accrues. *Teare* v. *Local Union No. 295 of United Assn. of Journeymen and Apprentices of Plumbers & Pipefitters, etc.,* 98 So. 2d 79 (Fla. 1957).

Sub judice, the trial judge properly submitted the question of fairness and accuracy of the publication on material matters and the question of malice or reckless disregard on the part of respondent in publishing said article to the jury. Quoting with approval from *Age-Herald Publishing Co.* v. *Waterman,* 102 Ala. 665, 81 So. 621, this Court declared in *Shiell* v. *Metropolis Co.,* supra, as follows:

> "A fair and accurate report may be made of a judicial proceeding either by reporting it literally and completely, or by giving a more or less condensed summary. And in case of a partial or con-

> densed report its fairness and accuracy with respect to the particular question in hand must in general be determined by the jury. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 449, 61 So. 345. In the instant case it was clearly a jury question."

See also: *Metropolis Co.* v. *Croasdell,* 199 So. 568 (Fla. 1941), *Meyers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla. 1907), *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Diplomat Elec. Inc.* v. *Westinghouse Elec. Supply Co.,* 430 F. 2d 38 (5th Cir. 1970), *Morgan* v. *Dun & Bradstreet, Inc.,* 421 F. 2d 1241 (5th Cir. 1970).

Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court.

Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.,* supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."

Accordingly, the decision of the District Court is quashed and the cause is remanded with directions to reinstate the jury verdict and final jugdment thereon in favor of petitioner.

It is so ordered.

ADKINS, C.J., ROBERTS, BOYD and DEKLE, JJ., Concur

OVERTON, J. Dissents with opinion

ERVIN J., Dissents

OVERTON, J., dissenting.

I dissent. In my opinion, there is no conflict jurisdiction. The District Court, in reversing the trial court, properly applied McCormick v. Miami Herald Publishing Company, 139 So. 2d 197 (Fla. 1962), and Hammond v. Times Publishing Company, 162 So. 2d 681 (Fla. App. 1964).

APPENDIX D

APPENDIX D

Opinion and order of the Circuit Court November 15, 1968, granting summary judgment for petitioner

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR PALM BEACH COUNTY

MARY ALICE FIRESTONE, *Plaintiff*, *vs.* TIME, INC., etc., *Defendant.*	Case No. 68 C 977–Smith

FINAL SUMMARY JUDGMENT

This cause was presented on Defendant's Motion for Summary Judgment. The Court has heard arguments of counsel, has considered the pleadings and the affidavits, timely filed, and the authorities cited, as well as other authorities. The Court cannot consider the affidavit of Joseph D. Farish, Jr., Esquire since the same was not filed until October 18, 1968, ten days following the hearing on Defendant's motion (see Siciliano v. Hunerberg, 135 So. 2d 750 and Stiles, Inc. v. Evans, 206 So. 2d 65).

Plaintiff relies on the case of Belli v. Orlando Daily Newspapers, 389 Fed. 2d 579. This Court also relied on this case in holding that the Complaint states a cause of action, its allegations being taken as true for purposes of ruling on the motion to dismiss. We are now, however, considering whether there is an issue of material fact. The evidence which may be considered by way of affidavits and answers to interrogatories is uncontradicted. In the opinion of this Court it shows that Defendant did not "maliciously" prepare the article in question, that Defend-

ant did not know that any words contained therein were untrue, and that Defendant did not act with malice towards the Plaintiff. Defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness. Under the facts shown and the authorities studied by the Court, Defendant's motion must be granted. It is thereupon,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted. It is further,

CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, MARY ALICE FIRESTONE, recover nothing by her suit against the Defendant, TIME, INC., and that said Defendant go hence without day.

DONE AND ORDERED this 15th day of November 1968.

/s/ CULVER SMITH
Circuit Judge

Copy furnished counsel

APPENDIX E

APPENDIX E

Opinion and order of the District Court of Appeal January 26, 1970, reversing the grant of summary judgment

MARY ALICE FIRESTONE, Appellant,

v.

TIME, INC., a foreign corporation transacting business in the State of Florida, Appellee.
No. 2640.

District Court of Appeal of Florida.
Fourth District.
Jan. 26, 1970.
Rehearing Denied March 5, 1970.

Joseph D. Farish, Jr., and Martin J. A. Yeager of Farish & Farish, West Palm Beach, for appellant.

H. R. Medina, New York City, and William S. Frates and Guy B. Bailey, Jr., of Frates, Fay, Floyd & Pearson, Miami, for appellee.

CROSS, Chief Judge.

Appellant-plaintiff, Mary Alice Firestone, appeals from a summary final judgment entered in favor of the defendant-appellee, Time, Inc., a foreign corporation transacting business in the State of Florida, in a cause of action in defamation. We reverse.

On December 15, 1967, Mary Alice Firestone was granted a divorce from Russell A. Firestone, Jr. The defendant, Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones" the following article:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune; Mary Alice Sullivan Firestone, 32,

> his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl'."

Thereafter on January 19, 1968, the plaintiff, Mary Alice Firestone, by her attorney demanded in writing a retraction of the said article. The defendant declined to retract.

Plaintiff then filed her complaint alleging that the defendant had maliciously prepared, composed, published and distributed the above alluded to article, which she claimed to be defamatory. The defendant in answer to plaintiff's complaint, denied the material allegations and asserted among other things the absence of actual malice.

Written interrogatories were propounded to the defendant, and prior to answer thereto the defendant moved for summary judgment. At the hearing on the motion for summary judgment the plaintiff orally moved for a continuance based on the fact that the defendant had not yet answered the interrogatories and that the interrogatories requested answers that would contain evidence material and relevant to the issues. The trial court denied the continuance.

After the defendant answered the interrogatories and prior to the court's ruling on the motion for summary judgment, the plaintiff submitted an affidavit of one Joseph D. Farish, Jr., which she asserted was in part based upon defendant's answers to interrogatories. The trial court declined to consider the affidavit on the basis of its being

untimely filed. Summary judgment was entered for the defendant, which in part reads as follows:

> "This cause was presented on Defendant's Motion for Summary Judgment. The Court has heard arguments of counsel, has considered the pleadings and the affidavits, timely filed, and the authorities cited, as well as other authorities. The Court cannot consider the affidavit of Joseph D. Farish, Jr., Esquire since the same was not filed until October 18, 1968, ten days following the hearing on Defendant's motion (see Siciliano v. Hunerberg [Fla. App.], 135 So. 2d 750 and Stiles, Inc. v. Evans [Stiles, Inc. v. George Evans Co., Fla. App.], 206 So. 2d 65).
>
> "Plaintiff relies on the case of Belli v. Orlando Daily Newspapers, [5 Cir.] 389 Fed. 2d 579. This Court also relied on this case in holding that the Complaint states a cause of action, its allegations being taken as true for purpose of ruling on the motion to dismiss. We are now, however, considering whether there is an issue of material fact. The evidence which may be considered by way of affidavits and answers to interrogatories is uncontradicted. In the opinion of this Court it shows that Defendant did not 'maliciously' prepare the article in question, that Defendant did not know that any words contained therein were untrue, and that Defendant did not act with malice towards the plaintiff. Defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness. Under the facts

shown and the authorities studied by the Court, Defendant's motion must be granted. It is thereupon,

"ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted."

Thereafter plaintiff moved for rehearing. The trial court denied this motion. This appeal followed.

The purpose of RCP Rule 1.510, 31 F. S. A., is to permit expeditious disposition of cases where no substantial issue of fact is presented for determination. It is intended to permit the trial court to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears that the uncontroverted facts set forth in the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Leaks v. Adeimy, Fla. App. 1967, 195 So. 2d 47; Lab v. Hall, Fla. App. 1967, 200 So. 2d 556; Stevens v. Gray, Fla. App. 1969, 217 So. 2d 350. But it is not intended that litigants shall be deprived of their right to a full hearing on the merits if any real issue of fact is tendered and "the power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification." Avrick v. Rockmont Envelope Co., 10 Cir. 1946, 155 F. 2d 568, 571. Thus the standards of decisions governing the granting or denying of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of establishing the absence of a genuine issue of material fact. At the same time the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one. It is the movant's burden to exclude the existence of any genuine issue of material

fact. 6 Moore, Federal Practice ¶ 56.15(3). All reasonable inferences are drawn against the movant in favor of the opponent of the motion. Lab v. Hall, supra. The papers supporting the motion are closely scrutinized, and the opposing papers indulgently treated. Holl v. Talcott, Fla. 1966, 191 So. 2d 40.

It is not to be concluded that palpably no genuine issue as to any material fact exists solely because the evidence opposing the claimed fact strikes the judge as being incredible. Issues of credibility are ordinarily for the trier of fact, and the trial court judge does not function as a trier of fact in determining a motion for summary judgment.

Where, as in the case at bar, the opposing party charges the moving party with printing a defamatory publication with malice, and must probe the conscience of the moving party to prove her case, or in any case where the subjective elements of willfulness, intent, maliciousness or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain. The telltale factor of demeanor in the presence of the trier of fact often assumes such vital importance in cases as the one at bar that the opposing party should generally not be denied the opportunity to have the moving party or its officers, employees or agents appear on the witness stand before the trier of fact. Indeed, subjective elements aside, a note of caution has been sounded in summary judgment proceedings in those cases where the opposing party must prove his claim or defense from what he can draw from the other party. Bozant v. Bank of New York, 2 Cir. 1946, 156 F. 2d 787.

The summary judgment procedure is not a trial by affidavits. Durkin v. Morgan, Fla. App. 1969, 227 So. 2d

231. Ample opportunity should be granted to the opposing party to justify his opposition. RCP Rule 1.510(f) provides that:

> "If it appears from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plainly, this section of Rule 1.510 contemplates that a denial of the motion for summary judgment is not always to be the result, but the ruling may be deferred and the motion decided after the opposing party has been granted an opportunity to develop through affidavits or depositions material necessary to justify his opposition.

Accordingly, the summary final judgment is reversed, and the cause is remanded to the trial court for further proceedings consistent herewith.

Reversed and remanded.

McCAIN, J., concurs,

REED, J., specially concurs, with opinion.

REED, Judge (concurring specially):

The plaintiff's motion for summary judgment was accompanied by affidavits of its employees each of whom played a part in the construction of the allegedly defamatory article. These affidavits denied actual malice on the part of the defendant and its employees toward the plaintiff

and also denied that defendant's employees had knowledge of the falsity of the article. The affidavits set forth in some detail the source of the information which appeared in the article as well as the efforts involved in checking the accuracy of that information. Basically the source of the information is traceable through the affidavits back to one Robert W. Delaney, a writer associated with Time Magazine. According to the Delaney affidavit, he was told by the attorney for the plaintiff that the grounds for the divorce were adultery and extreme cruelty. The Delaney affidavit also states that Delaney spoke directly with the trial judge, although the affidavit does not relate the conversation between the two of them. The Delaney affidavit is silent as to whether or not Delaney asked the trial judge about the grounds for divorce. None of the affidavits indicate that any of the Time employees actually read the final judgment of divorce before the article was written; however, the affidavit of one George G. Daniels, a Senior Editor of the defendant, reveals that several employees of Time actually checked the court files in connection with the plaintiff's divorce.

The basis for the summary judgment as I understand it was a determination by the trial judge that defendant published the article without actual malice. See the quotation from the final judgment in the majority opinion. We are not required at this stage to decide whether or not a showing of actual malice—as distinguished from implied malice—is essential to the plaintiff's cause of action or whether or not the publication was in any respect privileged. Without regard to those issues, it is my opinion that the trial judge erred in concluding that the affidavits made a showing sufficient for purposes of a summary judgment motion that the article was published without actual malice.

Appendix E

It is correct, as the trial judge pointed out, that the affidavits were uncontradicted, but all of the affidavits were submitted by employees of the defendant who had had a role in the preparation of the article. In my opinion, under these circumstances, there is inherent in the affidavits an issue of credibility which required the denial of the motion for summary judgment. For this reason only, I favor a reversal. See Tucker v. American Employers Insurance Company, Fla. App. 1969, 218 So. 2d 221 (cert. den. Fla. 1969, 227 So. 2d 482), where we said:

> "We are of the view that the granting of a summary judgment for the defendants in this case required the weighing of conflicting inferences *and an assessment of the credibility of interested witnesses* in order to conclude that no genuine issue of material fact existed, and this process is not available in passing on a motion for summary judgment * * *." (Emphasis added.)

APPENDIX F

APPENDIX F

Circuit Court Judgment After Trial September 9, 1970, for Respondent

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,

IN AND FOR PALM BEACH COUNTY, FLORIDA.
CIVIL ACTION

MARY ALICE FIRESTONE,
Plaintiff,
vs.
TIME INC., etc.,
Defendant.

No. 68 C 977-Smith

FINAL JUDGMENT

After trial by jury, a verdict having been entered for the Plaintiff, Mary Alice Firestone, and against the Defendant, Time, Inc., in the sum of $100,000.00, it is, therefore

ORDERED AND ADJUDGED that Plaintiff have and recover from the Defendant Time, Inc. the sum of $100,000.00, for which let execution issue. Costs to be assessed upon proper motion subsequent to this judgment.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, this 9th day of September, A. D. 1970.

/s/ CULVER SMITH
Circuit Judge

APPENDIX C

APPENDIX G

Opinion and Order of the District Court of Appeal October 28, 1971, Directing Entry of Judgment for Petitioner

TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

Oct. 28, 1971.

Rehearing Denied Dec. 2, 1971.

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, *Judge*.

Plaintiff, Mary Alice Firestone, is the ex-wife of the heir to the Firestone rubber fortune. The instant libel action stems from a short article published in Time magazine concerning plaintiff's divorce. The article said plaintiff had been divorced by her husband on grounds of extreme cruelty and adultery.

Plaintiff sued for libel, objecting to the word adultery, because she had received alimony and under Florida Law, F. S. 1967, Section 61.09, F. S. A., an adulterous spouse

may not receive alimony. Plaintiff was awarded $100,000. From that award Time appeals.

Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.

The doctrine of constitutional privilege in libel began with a holding that public officials could not be libeled in their public duties without proof of actual malice, *even if the publication was false*. This doctrine was soon expanded to include public figures. The final plateau was reached when the same criteria were held applicable to matters and events of public interest. This last category fits the situation at hand.

1. In capsule, New York Times Company v. Sullivan, 1964, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, established severe constitutional limits on libel actions brought by *public officials*. If the defamatory statement was directed at a public official, and concerned the performance of his public duties, the official could recover for libel only by proving actual malice. Actual malice was defined as knowledge of the falsity of your publication or reckless disregard for its truth.

It soon became apparent, however, that since the qualified privilege of New York Times was a constitutional one founded on the first amendment freedoms of speech and

press (an amendment said to occupy a top place in the hierarchy of the Bill of Rights) it was impossible to limit its application to public officials.

2. In the cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 1967, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094, the Supreme Court extended New York Times to include *public figures*, in these cases a football coach and a general with political prominence. Public figures were defined by Pauling v. National Review, Inc., 1966, 49 Misc. 2d 975, 269 N. Y. S. 2d 11, as "a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions." Standards for determining public figures were not exact. Each case was decided on its peculiar facts, each figure deemed public by his peculiar actions. See Cepeda v. Cowles Magazines and Broadcasting, Inc., 1968, 9 Cir., 392 F. 2d 417; Rose v. Koch, 1967, 278 Minn. 235, 154 N. W. 2d 409; Gilberg v. Goffi, 1964, 21 A. D. 2d 517, 251 N. Y. S. 2d 823; Mason v. Sullivan, 1966, 26 A. D. 2d 115, 271 N. Y. S. 2d 314; Dempsey v. Time, Incorporated, 1964, 43 Misc. 2d 754, 252 N. Y. S. 2d 186.

3. The next extension of New York Times began with Time, Inc. v. Hill, 1967, 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456. In that case the court applied the Times rule to false reporting of *matters of public interest* in connection with an action for invasion of the right to privacy. In other words, the right to privacy could be invaded if the public interest was great enough. Hill started a flood of public interest cases, Time, Inc. v. McLaney, 1969, 5 Cir., 406 F. 2d 565; Bon Air Hotel, Inc. v. Time, Inc., 1970, 5

Cir., 426 F. 2d 858. The result limited libel verdicts severely.

In sum, in order for a public official, public figure or a person involved in an event of great public interest to succeed in a libel action, actual malice must be proven.

Examples of events in the public interest, events where the public's right to know is superior to the individual's right to collect for damaged reputation include police raids for obscene books, organized crime, garbage pickups, pharmaceutical and laboratory testing, and the Master's Golf Tournament. Rosenbloom v. Metromedia, Inc., 1969, 3 Cir., 415 F. 2d 892; Wasserman v. Time, Inc., 1970, 138 U. S. App. D. C. 7, 424 F. 2d 920; Arizona Biochemical Company v. Hearst Corporation, 1969, D. C. S. D. N. Y., 302 F. Supp. 412; United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 1968, 9 Cir., 404 F. 2d 706; Bon Air Hotel, Inc. v. Time, Inc., supra.

Davis v. National Broadcasting Company, 1970, D. C. E. D. La., 320 F. Supp. 1070, discussed some criteria used in determining if the public interest test is applicable.

> "* * * *A person may become the subject of public interest within the meaning of that rule, although he does not seek to be one, and indeed attempts to avoid it.* Thus, a person called to testify unwillingly before a grand jury, a bystander at an event of public importance, or the family of a public official may well be public figures exposed to public comment that is protected by the privilege.
>
> "Hence, as expounded by the decision in *Bon Air,* the Fifth Circuit Rule is that *a publication about any matter of public interest is within the scope of the Times privilege,* and hence protected,

> absent a showing that the publisher knew that the statement was false or had serious doubt about its accuracy."

Rosenbloom v. Metromedia, Inc., 1971, 403 U. S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296, mentioned earlier in its lower court posture, was affirmed in a landmark United States Supreme Court case codifying with approval the numerous lower court expansions of New York Times to include matters of public interest. We feel this case is dispositive of our position and represents an authoritative codification of the doctrine of constitutional privilege.

The Rosenbloom facts concerned a police raid searching for obscene books. The court said,

> "* * * Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs.' Time, Inc. v. Hill, 385 U. S. 374 at 388, 87 S. Ct. 534, 17 L. Ed. 2d 456. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U. S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093 (1941)."

* * * *

"Moreover, the constitutional protection was *not* intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders

* * * felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' Curtis Publishing Co. v. Butts, 388 U. S., at 147, 87 S. Ct. at 1987 (opinion of Harlan, J.)." (Emphasis supplied except for cites.)

* * * *

"* * * The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. * * * *We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Emphasis supplied.)

* * * *

"* * * '[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.' St. Amant v. Thompson, 390 U. S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with *knowledge that it was false* or *with reckless disregard* of whether it was

false or not. Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.' Garrison v. Louisiana, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)." (Emphasis supplied except for citations.)

The Supreme Court did not define with exactitude what is in the public interest.

> "* * * [w]hether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." Rosenbloom, supra.

This is a state libel action and it is our delineation that the divorce of Mary Alice Firestone was an event of great public interest. It is even possible plaintiff was a public figure, but we need not go that far to substantiate our result. See Time, Inc. v. Johnston, September 13, 1971, 4 Cir., 448 F. 2d 378, for an interpretation of Rosenbloom's language concerning both public figures and events of great public interest.

The divorce trial in our case lasted seventeen months and there was much notoriety connected with it. Due to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.

The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. The fact that Time decided to publish news of the decree in the limited

space of its Milestones Column is in itself persuasively indicative of its great reader interest.

Given the divorce's inclusion as an event of great public interest, the only remaining question is one of malice. Only by so proving may plaintiff sustain a recovery. We can find no malice.

Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.

The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, "[a]ccording to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr." Part of this language was reproduced exactly in Time's article.

In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to

substantiate information. Plaintiff's attorney and the judge were called for verification.

It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it.

It is this court's conclusion that the judgment appealed from should be reversed. Time clearly falls under the New York Times umbrella of protection. The divorce of Mary Alice Firestone was an event of great public interest. There was no evidence of malice on Time's part.

The judgment is reversed and the cause remanded with instructions to enter a final judgment in favor of the appellant, Time, Inc.

Reversed and remanded.

REED, C. J., and OWEN, J., concur.